Filed 8/16/10 P. v. Ramirez CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MANUEL S. RAMIREZ,<br><br>Defendant and Appellant. | 2d Crim. No. B215205<br>(Super. Ct. No. 1282053)<br>(Santa Barbara County) |

Manuel S. Ramirez appeals from the judgment entered following his conviction by a jury of two counts of aggravated sexual assault of a child (Pen. Code, § 269, subd. (a)(1));[1] five counts of forcible rape (§ 261, subd. (a)(2)); six counts of forcible lewd act upon a child under the age of 14 years (§ 288, subd. (b)(1)); two counts of attempted forcible rape (§§ 664, 261, subd. (a)(2)); two counts of dissuading a victim from reporting a crime by threat of force or violence (§ 136.1, subd. (c)(1)); and one count of inflicting corporal injury on a child. (§ 273d, subd. (a).) As to each of the sex offenses, the jury found true an allegation that appellant had been convicted in the same case of committing specified sex offenses against more than one victim. (§ 667.61, subd. (e)(5).) The trial court sentenced appellant to a determinate term of 21 years, 4 months, plus an indeterminate term of 195 years to life.

[1] All statutory references are to the Penal Code.

Appellant contends: (1) his conviction on count 2 of forcible rape must be reversed because the crime is a lesser included offense of aggravated sexual assault of a child as charged in count 1; (2) the evidence is insufficient to support his convictions on counts 3, 6, and 11 of forcible lewd act upon a child under the age of 14 years; (3) the evidence is insufficient to support his convictions on counts 9 and 17 of dissuading a victim from reporting a crime by threat of force or violence; and (4) the execution of the sentences imposed on counts 12 and 14 for attempted forcible rape must be stayed pursuant to section 654.

Appellant's first contention has merit. Accordingly, we reverse the rape conviction on count 2. As to appellant's second contention, we accept respondent's concession that the evidence is insufficient to show that the victim of count 6, Jordan Doe, was under the age of 14 years at the time the crime was committed. Therefore, we reverse the conviction on count 6. We reject respondent's argument that the conviction on count 6 should be reduced to misdemeanor battery. The evidence is also insufficient to show that the victim of count 3, Jessica Doe, was subjected to the force, fear, or duress required for a violation of section 288, subdivision (b)(1). We reduce the conviction on count 3 to simple lewd act upon a child under the age of 14 years in violation of section 288, subdivision (a). We modify the sentence on count 3 by imposing a concurrent 15-year-to-life sentence instead of the consecutive 15-year-to-life sentence imposed by the trial court.

We reject appellant's third contention. We accept respondent's concession that appellant's fourth contention is meritorious. Pursuant to section 654, we stay execution of the sentences imposed on counts 12 and 14 for attempted forcible rape.

In all other respects, we affirm.

*Facts*

Jordan Doe

Jordan Doe was born in February 1992. She has two siblings: a sister, Jessica Doe, and a brother, John Doe. Appellant was the boyfriend of Jordan Doe's mother. When Jordan Doe was in third or fourth grade, appellant started living with her family.

(1RT 49-50) At that time, Jordan Doe looked up to appellant "as a father figure or a person to be respected." Appellant "kind of bec[a]me the head of the family." Appellant is 18 years older than Jordan Doe.

When Jordan Doe was in third or fourth grade, appellant started to touch her in inappropriate ways. The first incident (count 3) occurred when Jordan Doe, her mother, her sister, her brother, and appellant were all sleeping together in the same bed. Jordan Doe "woke up because [she] felt someone touching" her vaginal area. Jordan Doe "got up" and saw appellant "reaching his hand over [her] mom and touching" her vaginal area. Appellant "stopped and he just went back to bed and so did [Jordan Doe]."

As Jordan Doe grew older, the sexual incidents with appellant escalated into repeated acts of rape. Jordan Doe testified that, when she was "between the ages of 12 and 13," appellant had sex with her "like once or twice, every two weeks." After each sexual incident, appellant told Jordan Doe not to tell anyone about what had happened. Jordan Doe did not want to have sex with appellant, but she did not tell anyone about the incidents because she was scared of him. Although appellant never hit her, she had seen him physically abuse her mother and brother. Jordan Doe testified: "I was afraid of him like how he treats my brother and mom, and I would be scared of having him . . . hit me . . . ." Appellant said that, if Jordan Doe told about the sexual incidents, "our lives would be messed up and . . . would be miserable." (1RT 62) Once or twice appellant said that he would go to jail if she told.

Jessica Doe

Jessica Doe was born in January 1996. She was five or six years old when appellant "came into [her] life." Appellant is 22 years older than Jessica Doe. On several occasions, Jessica Doe orally copulated appellant. The first act of oral copulation occurred in the master bedroom of her grandmother's house (count 11). Jessica Doe was sitting on the bed and appellant was standing next to her. Appellant put his penis inside Jessica Doe's mouth. Jessica Doe did not want to orally copulate

appellant, but she did it because she was scared and because "he would yell at [her] if [she] didn't listen."

The sexual incidents with appellant included an act of forcible rape committed when Jessica Doe was 12 years old. After each sexual incident, appellant told Jessica Doe not to tell anyone about what had happened. Appellant said that, if she told someone, he "would leave [Jessica Doe's] family."

Jessica Doe was afraid to tell anyone about the incidents. She explained: ". . . I was . . . afraid that . . . he would do something bad, like . . . either yell at me or hit me if I told anybody . . . ." Jessica Doe had seen appellant commit acts of physical abuse against her brother and mother. On one occasion, appellant "started punching [her brother] on the couch" until his eye bled. On another occasion, Jessica Doe "saw [appellant] choking [her] mom on the couch."

John Doe, the Brother of Jordan and Jessica Doe

Appellant hit John Doe with a broom stick, a belt, or a hanger "[l]ike mostly every time [he made] mistakes." Sometimes the hitting occurred in the presence of his sisters. John Doe saw appellant hit Jessica Doe.

*Lesser Included Offense*

On count 1 appellant was convicted of aggravated sexual assault of a child (Jordan Doe) in violation of section 269, subdivision (a)(1), based on an act of rape as defined in section 261, subdivision (a)(2).[2] On count 1 appellant was sentenced to a consecutive term of 15 years to life. On count 2 appellant was convicted of raping Jordan Doe in violation of section 261, subdivision (a)(2). The rape alleged in count 2 is the same rape underlying the aggravated sexual assault conviction on count 1. On

[2] The verdict form erroneously designates count 1 as a violation of section 269, subdivision (a)(2). Section 269, subdivision (a)(2), defines the offense of aggravated sexual assault of a child based on the commission of rape or sexual penetration while acting in concert with another person in violation of section 264.1. Count 1 of the information correctly designates the aggravated sexual assault offense as a violation of section 269, subdivision (a)(1). The jury was never instructed as to section 264.1, and the evidence showed that appellant had committed the sex offenses while acting alone, not in concert with another person.

count 2 appellant was also sentenced to a consecutive term of 15 years to life. Appellant contends that "because count 1 rests on the same conduct and could not be committed without the commission of count 2, count 2 is a lesser offense to count 1 and appellant cannot stand convicted of both offenses."

Our Supreme Court "has long held that multiple convictions may *not* be based on necessarily included offenses. [Citations.]" (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) In determining whether a defendant may be convicted of multiple charged offenses, "a court should consider only the statutory elements." (*People v. Reed* (2006) 38 Cal.4th 1224, 1229.) "Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former." (*Id.*, at p. 1227.)

The statutory elements of aggravated sexual assault of a child in violation of section 269, subdivision (a)(1), include all of the statutory elements of rape in violation of section 261, subdivision (a)(2). At the time the offenses were committed, section 269, subdivision (a)(1), provided: "(a) Any person who commits any of the following acts upon a child who is under 14 years of age and 10 or more years younger than the person is guilty of aggravated sexual assault of a child: [¶] (1) A violation of paragraph (2) of subdivision (a) of Section 261."[3] Accordingly, we must reverse the conviction of the lesser included offense: rape in violation of section 261, subdivision (a)(2), as charged in count 2 of the information. (*People v. Pearson*, *supra*, 42 Cal.3d at p. 355.)

*Sufficiency of the Evidence: Standard of Review*

" 'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence - that is, evidence that is reasonable, credible, and of solid value - from which a reasonable trier of fact could

[3] The current version of section 269, subdivision (a)(1), is identical except that the age difference has been reduced from 10 to 7 years and the predicate offense is rape in violation of either paragraph (2) or (6) of subdivision (a) of section 261.

find the defendant guilty beyond a reasonable doubt.' [Citation.] . . . [A] reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 701.)

*Sufficiency of the Evidence: Count 6*

On count 6 appellant was convicted of committing a forcible lewd act upon a child (Jordan Doe) under the age of 14 years. (§ 288, subd. (b)(1).) Appellant was sentenced to a consecutive term of 15 years to life. Respondent concedes that the evidence is insufficient to establish that Jordan Doe was under the age of 14 years.

We accept respondent's concession. The offense charged in count 6 was committed when Jordan Doe was living in Guadalupe. Jordan Doe testified that her family had moved to Guadalupe "during the . . . last couple of months of [her] 8th grade" when she was "probably about 14" years old. Jordan Doe's 14th birthday was in February of her eighth-grade year.

We decline respondent's request that the conviction "be modified to reflect conviction of the lesser included offense of [misdemeanor] battery, which has no age requirement." "[S]uch a reduction would be inappropriate . . . because misdemeanor battery is subject to a one year statute of limitation (§ 802, subd. (a)). It is well established that the limitation of time applicable to an offense that is necessarily included within a greater offense is the limitation of time applicable to the lesser included offense, regardless of the limitation of time applicable to the greater offense. [Citations.] Here, the lewd act conviction was alleged and found to have occurred outside the one year period." (*People v. Mejia* (2007) 155 Cal.App.4th 86, 97, fn. 3.) Pursuant to the verdict form, the jury found appellant guilty of the offense as charged in Count 6 of the information. Count 6 alleged that the lewd act had occurred between September 2005 and June 2006. The felony complaint was not filed until April 15, 2008, almost two years after the last date on which appellant could have committed the offense as charged in count 6.

*Sufficiency of the Evidence: Counts 3 and 11*

On each of counts 3 and 11, appellant was convicted of committing a forcible lewd act upon a child under the age of 14 years in violation of section 288, subdivision (b)(1). On each count, appellant was sentenced to a consecutive term of 15 years to life. The victim in count 3 was Jordan Doe, and the victim in count 11 was Jessica Doe. Appellant contends that the evidence is insufficient to satisfy the statutory requirement that the lewd act be committed "by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." (§ 288, subd. (b)(1).)

Count 3

The lewd act charged in count 3 occurred when Jordan Doe, her mother, her sister, her brother, and appellant were all sleeping together in the same bed. Jordan Doe "woke up because [she] felt someone touching" her vaginal area. Jordan Doe "got up" and saw appellant "reaching his hand over [her] mom and touching" her vaginal area. Appellant "stopped and he just went back to bed and so did [Jordan Doe]."

The evidence is insufficient to show that the lewd act was committed "by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury . . . ." (§ 288, subd. (b)(1).) Jordan Doe was asleep when the lewd act occurred, and appellant stopped when she awoke and "got up." Thus, the conviction on count 3 must be reduced to a simple lewd act upon a child under the age of 14 years in violation of section 288, subdivision (a). (§ 1260 [appellate court may "reduce the degree of the offense"].)

The reduction to a conviction for a violation of section 288, subdivision (a), does not change the punishment (15 years to life) because on count 3 the jury found true a section 667.61, subdivision (e)(5), allegation that appellant had been convicted in the same case of committing specified sex offenses against more than one victim.[4]

[4] Count 3 alleged that the lewd act had been committed between September 2000 and June 2002. At that time, section 667.61, subdivisions (b), (c)(7), and (e)(5), provided for a 15-year-to-life sentence if the defendant was convicted of a violation of section

But the reduction means that a consecutive term of 15 years to life is not mandatory. The court imposed a consecutive term of 15 years to life because it apparently believed that a consecutive term was mandatory pursuant to current section 667.61, subdivision (i), which requires a consecutive sentence for a violation of section 288, subdivision (b), but not for a violation of section 288, subdivision (a).

We decline to remand the matter for resentencing on count 3. The reversals of the convictions on counts 2 and 6 have reduced appellant's aggregate indeterminate term by 30 years. With this reduction, the aggregate indeterminate term is now 165 years to life. If the matter were remanded for resentencing on count 3 and the trial court imposed a consecutive 15-year-to-life sentence, the aggregate indeterminate term would remain at 165 years to life. On the other hand, if the trial court imposed a concurrent 15-year-to-life sentence, the aggregate indeterminate term would be further reduced to 150 years to life. There is no practical difference between indeterminate terms of 165 years to life and 150 years to life. We therefore conclude that a remand for resentencing on count 3 would be wasteful of time and resources. It would also require appellant's transportation from state prison to the trial court, because he would have a right to be present with counsel at the resentencing hearing. (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 257-260.) Pursuant to section 1260, we give appellant the benefit of the doubt by modifying his sentence on count 3 to a concurrent term of 15 years to life.

Count 11

The lewd act charged in count 11 was committed in the master bedroom of Jessica Doe's grandmother's house. Appellant erroneously refers to this lewd act as

---

288, subdivision (a), and had been convicted in the same case of committing specified sex offenses against more than one victim. The corresponding subdivisions of current section 667.61 are subdivisions (b), (c)(8), and (e)(5).

count 10. The lewd act charged in count 10 was committed on a couch in the living room of a house that was close to Jessica Doe's grandmother's house.[5]

The lewd act charged in count 11 was based on Jessica Doe's oral copulation of appellant. This was the first time that she orally copulated him. She was no older than 10 or 11 years. Jessica Doe did not want to orally copulate appellant, but she did it because she was scared and because "he would yell at [her] if [she] didn't listen." Appellant told Jessica Doe not to tell anyone about what had happened. He said that, if she told about the incident, he would leave the family. A detective testified that Jessica Doe had said that appellant "forced her to do things that she did not want to do."

Substantial evidence supports the jury's implied finding that the lewd act charged in count 11 was committed by the use of duress. "For purposes of section 288, subdivision (b), 'duress' means ' "a direct or implied *threat* of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted." [Citations.]' [Citation.] ' "The total circumstances, including the age of the victim, and [her] relationship to defendant are factors to be considered in appraising the existence of duress." [Citation.]' [Citations.] 'Other relevant factors include . . . warnings to the victim that revealing the molestation would result in jeopardizing the family.' [Citation.]" (*People v. Veale* (2008) 160 Cal.App.4th 40, 46.)

---

[5] The lewd act charged in count 10 was committed when Jessica Doe was 10 or 11 years old. (1RT 106) Appellant and Jessica Doe were seated on separate couches in the living room watching television. Appellant "told [Jessica Doe] to come next to him." At first, Jessica Doe did not obey appellant because she did not want to come near him. Appellant yelled at her and made "a mad, angry face." Jessica Doe "went next to [appellant] on the couch." Appellant pulled down his shorts and underwear and "made [Jessica Doe] put his penis in [her] mouth." "[I]n the middle" of the oral copulation, Jessica Doe "stopped" but "started back up" because appellant got mad at her.

Based on the totality of the circumstances, a reasonable trier of fact could find beyond a reasonable doubt that appellant made an implied threat sufficient to coerce Jessica Doe into orally copulating him. Jessica Doe was no more than 10 or 11 years old. Appellant was 22 years older than her and "was an authority figure in the household." (*People v. Veale*, *supra*, 160 Cal.App.4th at p. 47.) Jessica Doe testified that she had orally copulated appellant because she was scared. Her fear was justified because she had seen appellant commit acts of violence against her brother and mother. On one occasion, appellant "started punching [Jessica Doe's brother] on the couch" until his eye bled. On another occasion, Jessica Doe "saw [appellant] choking [her] mom on the couch." According to Jessica Doe's brother, appellant hit him with a broom stick, a belt, or a hanger "[l]ike mostly every time [he made] mistakes." Sometimes the hitting occurred in the presence of his sisters. The brother also testified that he had seen appellant hit Jessica Doe.

Moreover, appellant warned Jessica Doe that " 'revealing the molestation would result in jeopardizing the family.' " (*People v. Veale*, *supra*, 160 Cal.App.4th at p. 46.) "The very nature of duress is psychological coercion. A threat to a child of adverse consequences, such as suggesting the child will be breaking up the family or marriage if she reports . . . the molestation, may constitute a threat of retribution and may be sufficient to establish duress . . . ." (*People v. Cochran* (2002) 103 Cal.App.4th 8, 15.)

*Sufficiency of the Evidence: Counts 9 and 17*

On counts 9 and 17, appellant was convicted of dissuading a victim from reporting a crime where the dissuasion was "accompanied by . . . an express or implied threat of force or violence . . . ." (§ 136.1, subd. (c)(1).) The victim on count 9 was Jordan Doe, and the victim on count 17 was Jessica Doe. Appellant contends that the evidence is insufficient to show the requisite threat.

We disagree. Considering the totality of the circumstances, a reasonable trier of fact could find beyond a reasonable doubt that appellant's commands not to tell anyone about the sexual incidents were accompanied by an implied threat of force or violence. Appellant told Jordan Doe that, if she told about the sexual incidents, "our lives would

be messed up and . . . would be miserable." Although Jordan Doe testified that appellant had never hit her, she had seen him physically abuse her mother and brother. Jordan Doe said that she "was afraid of him [appellant] like how he treats my brother and mom, and I would be scared of having him . . . hit me . . . ." Jessica Doe testified that she was afraid to tell anyone about the sexual incidents because she "was . . . afraid that . . . he [appellant] would do something bad, like . . . either yell at me or hit me if I told anybody . . . ." In the preceding section of this opinion, we explained that Jessica Doe's fear was justified since she had seen appellant commit acts of violence against her brother and mother. Furthermore, her brother testified that he had seen appellant hit Jessica Doe.

*Multiple Punishment in Violation of Section 654*

Section 654 prohibits multiple punishment for the same act. (*People v. Brookfield* (2009) 47 Cal.4th 583, 587.) Respondent concedes that execution of the sentences imposed on counts 12 and 14 for attempted forcible rape (§§ 664, 261, subd. (a)(2)) must be stayed pursuant to section 654.

We accept the concession. The acts underlying counts 12 and 14 are the same as the acts underlying counts 13 and 15, which charge forcible lewd act on a child under the age of 14 years. (§ 288, subd. (b)(1).) Counts 12 and 13 use identical language to describe the underlying act: "Defendant parks in a dark alley and attempts to rape the victim [Jessica Doe] from behind in the front seat of a Dodge Caravan." Counts 14 and 15 also use identical language to describe the underlying act: "Second time Defendant attempts to rape the victim [Jessica Doe] from behind in the bathroom at her grandma's house."

The trial court was required to impose sentence on each of counts 12 through 15. But it was also required to stay execution of the lesser sentences. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1472; *People v. Niles* (1964) 227 Cal.App.2d 749, 755-756.) The trial court selected count 12 as the principal term for the determinate sentence and imposed the middle term of seven years. On count 14,

appellant was sentenced to a consecutive full middle term of seven years.[6] On each of counts 13 and 15, appellant was sentenced to consecutive terms of 15 years to life. The trial court should have stayed execution of the lesser sentences for attempted forcible rape, as charged in counts 12 and 14, pending completion of the terms imposed for forcible lewd act on a child, as charged in counts 13 and 15, the stay then to become permanent.

*Disposition*

The conviction on count 2 is reversed because the count 2 offense (rape in violation of section 261, subdivision (a)(2)) is a lesser included offense of the count 1 offense (aggravated sexual assault of a child in violation of section 269, subdivision (a)(1)). The conviction on count 6 for forcible lewd act upon a child under the age of 14 years in violation of section 288, subdivision (b)(1), is reversed for insufficiency of the evidence. The conviction on count 3 for the same offense is reduced to simple lewd act upon a child under the age of 14 years in violation of section 288, subdivision (a). The consecutive sentence of 15 years to life on count 3 is modified to a concurrent sentence of 15 years to life.

Execution of the sentence imposed on count 12 for attempted forcible rape in violation of sections 664 and 261, subdivision (a)(2), is stayed pursuant to section 654 pending completion of the term imposed on count 13, the stay then to become permanent. Execution of sentence imposed on count 14 for the same offense is stayed

---

[6] Appellant argues, by way of a footnote, that a middle-term sentence of seven years on each of counts 12 and 14 was erroneous because a "midterm sentence for attempted rape would be three years, not seven." "This argument is waived by raising it only in a footnote under an argument heading which gives no notice of the contention. [Citations.]" (*People v. Crosswhite* (2002) 101 Cal.App.4th 494, 502, fn. 5.) In any event, the argument lacks merit. On counts 12 and 14 the jury found true multiple victim allegations pursuant to section 667.61, subdivision (e)(5). The penalty for forcible rape with a multiple victim enhancement is 15 years to life. (§ 667.61, subds. (b), (c)(1), & (e)(5).) Section 664, subdivision (a), provides that if the crime attempted is punishable by a maximum sentence of life imprisonment, the attempt is punishable by imprisonment for five, seven, or nine years.

pursuant to section 654 pending completion of the term imposed on count 15, the stay then to become permanent.

In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to transmit a certified copy to the Department of Corrections and Rehabilitation.

NOT FOR PUBLICATION.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Jed Beebe, Judge

Superior Court County of Santa Barbara

---

Danalynn Pritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Blythe J. Leszkay, Deputy Attorney General, for Plaintiff and Respondent.